

#### **4 Official Opinions of the Compliance Board 168 (2005)**

##### **EXECUTIVE FUNCTION EXCLUSION – DISCUSSION WITH POTENTIAL CONTRACTOR DURING PROCUREMENT PROCESS, HELD TO BE OUTSIDE THE EXCLUSION – “MEETING” – DISCUSSION OF MEANS OF DISCERNING RESIDENTS’ REACTION TO ANNEXATION PROPOSALS, DETERMINED TO BE A MEETING – NOTICE REQUIREMENTS – CONTENT – AGENDA INFORMATION NOT REQUIRED – OMISSION OF MEETING, TIME, HELD TO BE A VIOLATION**

October 13, 2005

*Peter G. Robertson*

The Open Meetings Compliance Board has considered your complaint that the Commissioners of Queenstown violated the Open Meetings Act in connection with a series of meetings between December 28, 2004 and February 2, 2005.

For the reasons explained below, we conclude that the Commissioners violated the Act on February 2 by conducting a closed session under the assumption that the session involved an executive function, when the Act in fact applied. We also find that notice of the December 28 meeting had an improper omission, although the method of notice was lawful, and that the process for providing the public with summaries of closed meetings was defective. However, we find no violations of the Act in connection with the Commissioners’ agenda items at any meeting or preparation of minutes for the meeting on December 28 that was closed pursuant to the Act.

### **I**

#### **Complaint, Response, and Informal Conference**

The complaint alleged that at three meetings – those on December 28, 2004, and January 11 and 25, 2005 – the Queenstown Commissioners violated some of the Open Meetings Act’s requirements, those related to notice (including allegations related to publicly distributed agendas) and minutes. In addition, the complaint alleged that, on February 2, 2005, the Queenstown Commissioners held a meeting that violated the Act in all respects. In the Commissioners’ response, submitted on their behalf by Anthony G. Gorski, Esquire, the Town Attorney, the Commissioners

denied any violation.<sup>1</sup> After reviewing the complaint and the Commissioners' response, the Compliance Board determined that a better understanding of the meetings was required prior to issuance of an opinion. Thus, an informal conference was conducted on September 27, 2005.<sup>2</sup>

This opinion draws on information from the complaint, response, and informal conference. For a clearer presentation of the issues, the opinion is organized somewhat differently than the complaint and response.

## **II**

### **Issues About Notice**

#### ***A. Meeting Notice: December 28 Meeting***

##### **1. Complaint and response.**

December 28, 2004, would have been a regular meeting date, because the Commissioners routinely meet on the second and fourth Tuesday of each month. At a regular meeting the previous month, however, it was announced that, owing to the Christmas holiday period, no meeting would be held on December 28. The Town then mailed out a flyer to Town residents indicating that no meeting would be held on this date. Nevertheless, according to the complaint, at a public meeting on December 14, the President of the Board of Commissioners announced at the end of the meeting "to an empty room" that a meeting would indeed be held on December 28. The complaint alleged that no public notice was ever given of the change in schedule.

The Commissioners' response described the December 28 meeting as a "duly scheduled and noticed executive (closed) session." Included with the response was

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<sup>1</sup> Although the complaint was also filed against the Town Planner and Town Attorney, the Open Meetings Act applies only to public bodies such as the Queenstown Commissioners; thus, neither agent identified in the complaint can be the subject of a complaint filed with the Compliance Board. The complaint also noted that citizens only have 45 days in which to file a complaint. This is incorrect. The Open Meetings Act does not prescribe a limitations period in which to file a complaint with the Compliance Board. The 45-day period referred to relates to filing a judicial action in the courts. Your complaint also included several general allegations suggesting that Town officials have attempted to "mislead and deceive the public" over the past four years, allegations the Commissioners have denied. In any event, we decline to address such allegations in the abstract.

<sup>2</sup> Scheduling difficulties resulted in the delay of the conference until this date. During the conference, we heard from the complainant (now a member of the Town Commission), Commission President John W.S. Foster, III, Commissioner Mitchell A. Keiler, former Commissioner Winfield H. Miller, and Town Attorney Anthony G. Gorski.

a copy of the minutes of the Commissioners' December 14 meeting, reflecting that "[a]n [e]xecutive [s]ession is scheduled for Tuesday, December 28, 2004 at 6:00 p.m. at the Town office to consult with counsel." The response noted that any changes in the regular meeting schedule are posted in the Town office in a manner that is visible from the outside after hours and in two additional locations in the Town. Furthermore, to the extent possible, at the close of each meeting, a reminder of the next scheduled meeting is announced. The Town also posts meeting announcements and changes on its web page and sends electronic notice to all interested parties, including the local media, if they have provided an e-mail address to the Town. The response included evidence that the complainant was e-mailed notice of the December 28 meeting on December 22. A copy of the notice of the December 28 meeting was provided with the response.

## **2. Compliance Board discussion.**

A public body is required to give reasonable advance notice of any meeting that is subject to the Act, regardless of whether the meeting is open or closed. §10-506.<sup>3</sup> Once notice is provided, a revised notice is generally required if some material element required in the notice is changed. 3 *Official Opinions of the Maryland Open Meetings Compliance Board* 85, 86 (2001)(Opinion 01-3).<sup>4</sup> By the same reasoning, if a public body has announced that it will *not* meet on what would ordinarily be a meeting date but later reverses its decision, the public must be given adequate notice of the revived meeting.

The Open Meetings Act prescribes the minimal information that notice of a meeting must contain: "Whenever reasonable, a notice ... shall : (1) be in writing; (2) include the date, time, and place of the session; and (3) if appropriate, include a statement that part or all of a meeting may be conducted in closed session." §10-506(b). The copy of the written notice provided with the Commissioners' response indicated that "the Commissioners will be meeting in executive session on Tuesday, December 28, 2004 to consult with counsel. There will be no regular Commissioners meeting that night." While we understand that the Commissioners routinely meet at 6:00 p.m. on the second and fourth Tuesday each month, presumably at the same location each time, the notice nevertheless fails to fully satisfy the requirements of the Act, because it did not reveal that this newly announced meeting – explicitly said not to be a regular meeting – would begin at 6:00 p.m. Interested members of the public should not have been left to guess about the time. §10-506(b)(2). Considering that the session would be closed, this criticism might appear to some as overly technical. However, the public has a right to observe

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<sup>3</sup> Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

<sup>4</sup> For brevity's sake, we shall hereafter cite our opinion volumes as *OMCB Opinions*.

the process by which a public body moves into closed session. §10-508(d)(2). Therefore, this deficiency in the written notice violated the Act.

Concerning the method of giving notice, the Open Meetings Act gives public bodies such as the Town Commissioners considerable discretion. §10-506(c); 3 *OMCB Opinions* 264, 266-267 (2003) (Opinion 03-4). There is no question that the combination of methods used by the Commissioners to provide notice of their meetings is reasonable under the Act. While the practice of announcing the next meeting date at the close of a meeting might appear meaningless if the public has already left, the combination of the posting of notice in multiple locations, the announcement on the Town's web page, and the personal e-mail message to citizens who have requested such notice more than adequately satisfies the Act's requirement.

***B. Agenda Availability and Changes: December 28 and January 11 and 25 Meetings***

**1. Complaint and response.**

The complaint alleged that the Commissioners failed to release an agenda in connection with their December 28, 2004, meeting and that agendas for meetings held on January 11 and 25, 2005, were deficient for various reasons. Specifically, the complaint alleged that on January 11, after the agenda for that evening's meeting had been distributed, "it was learned that something noteworthy was to occur at the meeting." A telephone call to the Town office confirmed the rumor that "something noteworthy" would take place, but the employee contacted could not be any more specific. No update to the agenda was provided at the start of the meeting. The Town Attorney used the time designated for the Town Planner to announce that Kramer & Associates had submitted a proposal to assist the Commissioners in dealing with the public on matters relating to an annexation proposal that had been submitted by the Elm Street Development Corporation. The President immediately made a motion to hire Kramer & Associates at the rate of \$10,000 per month. The motion was seconded, but the third Commissioner objected because no request for proposals had been sent to other firms. The motion was then tabled until January 25.

The complaint noted that the agenda for the January 25 meeting did not mention the hiring of Kramer & Associates. When asked about the omission, the President indicated that it would be discussed later in the meeting. The Town Clerk indicated that the omission from the agenda was her mistake. The topic was addressed at the very end of the meeting, but not put to a vote because some qualified firms had not yet been contacted.

The Commissioners asserted that the Open Meetings Act does not require them to provide an agenda. Thus, any variation from a previously circulated agenda would not violate the Act.<sup>5</sup>

**2. Compliance Board discussion.**

We agree with the Commissioners that a public body is not required to produce an agenda under the Open Meetings Act. As we have previously explained, “[a]lthough many public bodies routinely provide an anticipated agenda for the benefit of the public, a practice we consider commendable, the failure to do so, or a deviation from an agenda, is simply not a violation [of the Act.]” 3 *OMCB Opinions* 264, 271-272 (2003) (Opinion 03-4). Thus, the allegations in the complaint related to the availability of an agenda or the description of agenda items lack merit.

**III**

**Issues About Minutes**

***A. Minutes of December 28 Meeting***

**1. Complaint and response.**

The complaint alleged that no minutes were recorded or published in connection with the December 28 meeting.

The response reported two activities on December 28. First, the Commissioners heard from Mr. Bob Kramer of Kramer & Associates about the services the firm could offer in regard to upcoming annexation issues. Mr Kramer appeared at the invitation of the Town Planner, and the timing of the presentation was to accommodate Mr. Kramer’s schedule and had nothing to do with the scheduled closed meeting itself. Then, after Mr. Kramer left, the Commissioners proceeded to discuss various legal and litigation issues with their counsel.

Apparently, no minutes were taken of the Commissioners’ session with Mr. Kramer, conducted prior to the closed session itself. Whether minutes were required depends on whether this session was subject to the Act. According to the Commissioners, this portion of the meeting involved an executive function to which

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<sup>5</sup> In the case of the January 11 meeting, there was not even a variation, according to the response. A memo from the Town Planner was provided to the Commissioners through the Town Attorney.

the Act does not apply. We discuss this point in Part IV below. The Commissioners, however, provided a copy of the minutes of the closed meeting with counsel.<sup>6</sup>

**2. Compliance Board discussion.**

The Commissioners complied with the Act's requirement that it prepare minutes for the portion of the December 28 meeting that the Commissioners understood to be subject to the Act. Furthermore, for the reasons explained in Part IV of this opinion, we reach no conclusion whether the Act applied to the presentation by Mr. Kramer, and consequently we do not reach the subsidiary question whether minutes of this session were required.

***B. Summary of December 28 Meeting***

**1. Complaint and response.**

We understand the complaint's allegation that minutes of the December 28 meeting were not "published" to mean that a summary about the meeting did not appear in the minutes of the next open meeting. The Commissioners included with their response a copy of a "minutes addendum," approved by the Commissioners on February 22, 2005, reflecting the post-meeting disclosures required under §10-509(c)(2) in connection with the December 28 meeting and closed sessions on three other dates.

**2. Compliance Board discussion.**

When a meeting is closed under the Act, the minutes of the next public meeting must include certain information in connection with the closed session. §10-509(c)(2). It does not suffice for a public body to wait several months and then approve summary statements, compiled in a single document, for numerous closed meetings. This is evidently what the Commissioners did on February 22, for meetings going back to October 26, 2004. We find this action to be inconsistent with §10-509(c)(2).

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<sup>6</sup> Because the minutes reflect a meeting closed under §10-508(a)(7), the Commissioners are entitled to consider the minutes confidential, §10-509(c)(3)(ii), and we are obligated to maintain that confidentiality in connection with the copy we received. §10-502.5(c)(2)(iii).

**IV**

**Closed Sessions with a Potential Contractor**

***A. December 28***

**1. Complaint and response.**

The complaint alleged a violation because “the three Town Commissioners, the Town Planner, and the Town Lawyer met with Kramer and Associates ... for what purpose we do not know.” The Commissioners confirmed that Mr. Kramer, who was at the meeting at the invitation of the Town Planner, introduced himself and addressed them concerning services that his firm could offer “to assist the Commissioners in identifying the issues of the Town [r]esidents in regards to upcoming annexation issues, and to assist them in communicating with one another on these same points.” Apparently, this session was held in advance of the closed meeting advertised for that evening. The Commissioners described this portion of the meeting as involving an “executive function” to which the Open Meetings Act did not apply. §10-503(a)(1)(i).

**2. Compliance Board discussion.**

If the session with Mr. Kramer involved an executive function, it was permissible for the Commissioners to close it to the public, to keep no minutes, and to make no later disclosure about it, for the Act would not have applied. §10-503(a)(1)(i).

An executive function analysis requires a two-part test: First, did the topic of discussion fall within any other defined function? If so, by definition it cannot be considered an executive function. §10-502(d)(2). If not, did the discussions involve the administration of existing law? §10-502(d)(1). 4 *OMCB Opinions* 99, 107 (2004). We shall focus our attention on the first part of this test. One instance of a “quasi-legislative function” – and so, by definition, *not* an executive function – is any part of “the process or act of ... approving, disapproving, or amending a contract.” §10-502(j)(3). Was Mr. Kramer’s appearance on December 28 the first step in a process that potentially would have resulted in the approval of a contract with him?

It is likely that the Town Planner wanted Mr. Kramer to meet the Commissioners because he understood that, given the controversy over the annexation proposal, outside consulting services might be needed. Mr. Kramer would have been a negligent businessman not to have taken the opportunity to tell the Commissioners how they could benefit from his firm’s services in dealing with Town residents on proposed annexations. And, of course, the December 28 encounter did lead to further discussions about a possible contract.

Nevertheless, we must be careful not to let hindsight influence our judgment whether the Commissioners should have viewed Mr. Kramer's appearance as the initial step in a contractual negotiation. It is at least plausible to suppose that his appearance and presentation of information about his firm might have been perceived, at least initially, as part of the Town Planner's administration of details related to the annexation proposal, as distinct from putting squarely on the Commissioners' agenda the question of contracting for these consulting services.

In short, we lack sufficiently detailed information about the context of the December 28 appearance by Mr. Kramer to offer an opinion whether the Act applied.

***B. February 2***

**1. Complaint and response.**

The complaint alleged that the three Commissioners met "in secret" in Annapolis on February 2 with members of Kramer & Associates "in direct violation of the Open Meetings Act." The complaint alleged that Kramer & Associates had already been retained by the Town at this point and that the Commissioners had each received a binder laying out a strategy as to how the Commissioners were to approach Town residents during their "listening tour" and the specific questions they were to ask. According to the complaint, no notice of the February 2 meeting was provided and no mention of the meeting was reflected in the minutes of the Commissioners' meeting on February 8.

The Commissioners responded that the February 2 meeting involved an executive function and therefore the provisions of the Open Meetings Act did not apply. They also argued that the meeting was not "convened for the consideration or transaction of public business" and so did not constitute a "meeting" for purposes of the Act. In support of their position, the Commissioners cited 3 *OMCB Opinions* 274 (2003) (Opinion 03-5).

According to the Commissioners, the purpose of the meeting with Kramer & Associates was to hear their proposal as to how the Commissioners could effectively meet with as many residents as possible in a short time frame and how to ensure that they were obtaining meaningful information for use in their deliberations on annexation petitions. They also discussed how they could more effectively communicate their concerns with each other. There was no consideration of the merits of any petition or debate regarding policies of the Town.

**2. Compliance Board discussion.**

We turn first to the contention that the February 2 session was not a "meeting" subject to the Act. The opinion relied on by the Commissioners addressed sessions attended by the mayor and governing body of a municipality geared to improving communication skills among the participants. No specific municipal



policy or business was raised during the process. We concluded that none of the sessions was a “meeting” as defined by the Act. 3 *OMCB Opinions* at 276.

Had the February 2 session solely involved improving communication skills among the three Commissioners, and had Kramer & Associates been hired as facilitators for this, we might well accept that the Commissioners’ analogy to our prior opinion applied. However, as the Commissioners acknowledged, the session involved the Kramer firm’s potential role in improving their ability to understand and address *Town residents’* concerns in connection with annexation requests. Although it was suggested that the session did not involve any particular annexation, a session addressing how the Commissioners might handle residents’ concerns in annexation matters – matters that can often prove controversial, as the one pending before the Commissioners had become – is manifestly part of the public business. To suggest that these sessions did not involve public business stretches the holding in the cited opinion much too far. The more pertinent Compliance Board opinion is the one in which we held that the Act applied to discussions among members of a public body about how to accommodate members of the public desiring to address the body. 1 *OMCB Opinions* 113, 114 (1995) (Opinion 95-2). The manner in which local officials might better interact, not just among themselves but with residents in connection with a specific area of municipal concern, is itself the “consideration ... of public business.”

We turn next to the question whether, as the Commissioners argued, the February 2 session fell under the executive function exclusion from the Act. Based on statements made at the informal conference, it is clear that at least some, if not all, of the Commissioners who attended the meeting viewed it as a setting at which they were wearing their “administrative hats.” In the nomenclature of the Act, the session was viewed as involving an executive function to which the Act does not apply. §10-503(a)(1)(i).

But this position is untenable in light of the procurement process that was already underway before February 2. A week earlier, according to information presented at the informal conference, the Town had issued a request for proposals (RFP), soliciting for services related to a survey of Town residents in connection with the proposed annexation. On February 2, the Kramer firm made a “sales pitch” to get the work described in the RFP. While it appears that the costs of these services would have been charged to those seeking the annexation, nevertheless, any contract for the services would have been between Kramer & Associates and the Town.<sup>7</sup>

The Act does not suddenly spring into effect only when a public body reaches the point at which it decides whether or not to approve a proposed contract. Rather, it applies to every step of the consideration process that precedes the decision point. To be sure, in this case a contract never resulted. Nonetheless, the Commissioners’

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<sup>7</sup> As events unfolded, a contract was never entered, and the proposal submitted by Kramer & Associates was withdrawn.

February 2 meeting, at which the proposal was presented and discussed, cannot be considered an executive function outside the scope of the Act. *See, e.g., 3 OMCB Opinions* 328, 332-333 (Opinion 03-16 (2003) (contract approval extends to public body's role in development of a contract)). Because the the Commissioners' meeting in Annapolis on February 2 was conducted without regard to the requirements of the Open Meetings Act, the Act was violated.

## **V**

### **Conclusion**

We conclude that the Town Commissioners violated the Act when conducting the session with Kramer & Associates on February 2. We also find that notice of the December 28 meeting had an improper omission, although the method of notice was lawful, and that the process for providing the public with summaries of closed meetings was defective. However, we find no violations concerning agenda items at any meeting or preparation of minutes for the meeting on December 28 that was closed pursuant to the Act.

OPEN MEETINGS COMPLIANCE BOARD

*Walter Sondheim Jr.*  
*Courtney J. McKeldin*  
*Tyler G. Webb*